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No. 682.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965.

THE OVERLAKES CORPORATION,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

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Of Counsel.

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Statement of the Case.

A full statement of the case is set forth in the Petition For a Writ of Certiorari on pages 4 through 8.

Argument.

The Brief For The Respondent In Opposition to the Petition For A Writ Of Certiorari makes two points, and is in error with respect to both of them.

1. Petitioner reported its receipts, expenses and net income for the two years in question, 1951 and 1952, on the accrual method of accounting (Pet. 4). Petitioner in 1951

accrued sales of $2,116,505, costs of $1,982,187 and profits (net income) of $134,318; it was later found to have had no excessive profits in 1951 (Pet. 5). The government nevertheless contends that it would be "inconsistent with the accrual method of accounting" to allocate to 1951 none of the excessive profits accrued and included in income in 1952 and later repaid to the government (Resp. Brief 4). The government's contention is clearly unsound: the accrual method of accounting requires that both receipts *and* expenses be reported on the accrual method. The government ignores this obvious fact and attempts to allocate the recaptured excessive profits on the basis of sales made in each of the years. By thus ignoring petitioner's expenses, the government seeks to allocate $200,353 of the recaptured excessive profits to 1951, although in 1951 petitioner had no excessive profits and had only $134,318 of net income under the contract (Pet. 6). In a case of such importance to petitioner and to all governmental contractors, these facts cannot be ignored.

2. The instant case is in direct conflict with *McDonnell Aircraft Corp.* v. *United States,* 342 F. 2d 943 (8th Cir. 1965) (Pet. 11). There the Court held that recaptured excessive profits should be allocated to 1951, the year in which the taxpayer had included such profits in net income. The government contended in *McDonnell* that the recaptured excessive profits should be allocated over a three year period, 1949-1951, on the basis of sales made during each of those years, even though no amount had been included in taxpayer's net income for the years 1949 and 1950.

The government here attempts to distinguish the instant case from the *McDonnell* case on the dual grounds that "there the refund was the result of a full-fledged renegotia-

tion proceeding" involving "many contracts, not, as here, on the basis of a particular contract" (Resp. Brief 5). As to the first ground, the Renegotiation Board has said, ". . . the purpose of the Renegotiation Act as defined by Congress . . . is accomplished both by Board proceedings resulting in refunds of excessive profits and by voluntary actions of contractors." (Pet. 12). Voluntary settlements are to be encouraged. As to the second ground, whether one or many contracts are involved in a renegotiation is palpably immaterial. The statute and the cases afford no support for so distinguishing *McDonnell* from the instant case.

Conclusion.

For the reasons set forth in the Petition For A Writ Of Certiorari, especially in light of the conflict between the circuits discussed herein, the question presented clearly calls for an exercise of this Court's power of review.

Respectfully submitted,

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